SYARIKAT CHEAP HIN TOY MFE SDN. BHD.

v.

SYARIKAT PERKAPALAN KRIS SDN. BHD. & ANOR.

HIGH COURT SABAH & SARAWAK, SIBU
TUAN STEVE SHIM J
[CIVIL SUIT NO. 18 OF 1990]
27 MAY 1995

CONTRACT: *Breach - Non-delivery of goods - Whether non-delivery defeats the fundamental purpose of the contract - Exemption clause - Clause limiting liability - Whether clause applicable when there was total failure to perform fundamental term of contract.*

TORT: *Negligence - Delivery order lost whilst in defendant's custody - Failure to keep documents in safe and proper custody - Whether negligence established - Whether principal vicariously liable for negligence of agent.*

An order was placed with the plaintiff for the supply and shipment of seven items of fireworks and firecrackers amounting to RM457,800 and it was agreed that payment would be made in exchange of relevant documents. The goods were packed, loaded into containers, sealed and delivered to Port Klang for shipment to Sibu and the relevant invoices and convoy notes were prepared. The containers were then loaded by the plaintiff's forwarding agent onto the ship owned by the first defendant. The first defendant's shipping agent prepared the necessary bill of lading covering the goods in question which was handed to the plaintiff's forwarding agent and subsequently sent to the plaintiff, which was then submitted together with the relevant invoices and customs declarations to the plaintiff's bank, who in turn transmit the same to its representative bank. When the ship arrived in Sibu, the cargoes were discharged together with the container and kept in a container yard.

When no payment arrived from the consignee for the delivery of the goods, the plaintiff called the shipping executive of the second defendant, who was also the shipping agent of the first defendant, and was informed of the loss of the goods after it was discharged from the ship. A police report was lodged concerning the loss of the said delivery order. The plaintiff subsequently claimed for damages for non-delivery of goods in breach of contract against the first defendant and negligence against the first and second defendant.

Held:

[1] Documents such as the delivery orders were very often referred to and hence although they might have been kept in the drawer under lock and key, they would have to be taken out on a very regular basis. The keys to the drawer would also have to be passed around all the time. It would therefore not be difficult to accept the possibility that the documents could well be negligently misplaced or left unattended by the second defendant.

[2] The second defendant was obligated to notify the consignee of the intended arrival of the ship, to allow the consignee and its agent to make the necessary preparations in taking delivery of the goods as soon as they were discharged from the ship. However, it appeared that the second defendant has not taken the effort or time to notify the consignee or its agent of the intended arrival of the ship and the goods in question. In the given circumstances, negligence on the part of the second defendant has been established.

[3] The second defendant was at all material times the shipping agent of the first defendant. The act of the second defendant was one which was done in the course of its employment as shipping agent. Such an act must be imputed to the first defendant as principal. The first defendant was therefore vicariously liable for the negligence of its agent, the second defendant.

[4] Under the contract the main object is the proper delivery of the goods stated therein to the consignee. It would defeat this object entirely if the first defendant or its agent acting negligently had caused the goods to be delivered to some unauthorised person or persons thereby resulting in loss to the plaintiff without being liable for the consequences. Clause 2(c) must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract. It must at least be modified so as not to permit the first defendant as the shipping company, or its agent, in the circumstances, to disregard their obligation as to delivery.

[Plaintiff's claim allowed]

Case referred to:
Sze Hai Tong Bank v. Rambler Cycle Co. Ltd. [1959] AC 576 ***(foll)***

Other source referred to:
Charlesworth on Negligence, 6th Edn., p. 1286

For the plaintiff - Kho Lik Kiat; M/s. Chan Kho & Loy
For the 1st defendant - Chambai Lindong; M/s. Lau & Co.
For the 2nd defendant - George Lim; M/s. Battenberg & Talma

JUDGMENT

Steve Shim J:

In this suit the plaintiff syarikat Cheap Hin Toy Mfe Sdn. Bhd. has claimed for damages, interest and costs firstly against the 1st defendant Syarikat Perkapalan Kris Sdn. Bhd. for non-delivery of goods in breach of contract and secondly, against the 1st defendant and the 2nd defendant Sebor (Sarawak) Trading Sdn. Bhd., Sibu, for negligence.

The facts can be briefly stated herein. On or about 15 April 1989, Mr. Chieng Ung Kai, purporting to represent a company called Hua Ho (1981) Co. of No. 76, Sg. Antu, Sibu, called at the office of the plaintiff located at No. 27, Jalan Cheng Lock, Kuala Lumpur, where he saw Mr. Chin Yew Choy PW1, the managing director. Thereat, Mr. Chieng placed an order for 7 items of fireworks and firecrackers amounting to RM457,800 to be shipped from Port Klang to his office at the above address in Sibu. It was agreed that the mode of payment was to be on the basis of what is known in commercial jargon as document against payment or in short "DP/P" which means payment to be made in exchange for the relevant documents. On the same day Mr. Chin Yew Choy PWI contacted his store keeper Mr. Chai Kim Min PW2 giving details of the type and quantity of the goods required to be supplied and shipped to the consignee Hua Ho (1981) Co. Under PW2's supervision, the goods were properly packed and loaded into 3 containers which were then sealed and delivered to Port Klang in preparation for shipment to Sibu. The relevant invoices and convoy notes were prepared. At Port Klang, the 3 containers were loaded onto the vessel "MV Kris Lemona" which was owned by the 1st defendant. The loading was done by Hoerudin Penghantaran dan Pengangkutan Sdn. Bhd. the forwarding agent of the plaintiff. Thereafter, the necessary bill of lading covering the goods in question was prepared by Kris Pahlawan Sdn. Bhd., the shipping agent of the 1st defendant at Port Klang. This bill of lading was then handed over to Hoerudin Penghantaran dan Pengangkutan which subsequently sent it to the plaintiff where

it was counter-signed by Mr. Chin Kong Hin PW4, one of the directors of the plaintiff. Later, the said bill of lading together with the relevant invoices and customs declarations were submitted to the plaintiff's bank, the Bangkok Bank which in turn transmitted the same to its representative bank, the Malayan United Bank (MUI Bank) in Sibu.

On or about 20 April 1989, the vessel "MV Kris Lemona" set sail from Port Klang bound for Sibu laden with cargoes including those covered by the bill of lading mentioned above. The vessel arrived at the Rejang Port Sibu or RPA on or about 25 April 1989, and thereafter discharged its cargoes. The 3 containers consisting of the goods, forming the subject-matter of this case, were admittedly unloaded from the vessel "MV Kris Lemona" and kept in the container yard of RPA.

Having despatched the relevant bill of lading, invoices and customs declaration pertaining to the goods in question, Mr. Chin Yew Choy PW1 waited for payment from Mr. Chieng Ung Kai but nothing was forth-coming and so on or about 10 April 1989, he rang up Mr. Liman ak Engkabi DW1, the shipping executive of the 2nd defendant which was the shipping agent of the 1st defendant. PW1 inquired about the relevant delivery order and was informed by DW1 of the loss of the goods after their discharge from the vessel "MV Kris Lemona". The next day PW1 flew to Sibu where he saw a number of people including Mr. Liman DW1. He also went to the RPA and the Customs Department to make inquiries. In the meanwhile Mr. Liman DW1, upon discovering the loss of the relevant delivery order, went to RPA to check on the goods but all he managed to find were 3 empty containers. He then lodged a police report concerning the loss of the said delivery order.

As both claims of the plaintiff are somewhat connected, I find it appropriate to deal with the second claim first. This claim, as I have said, is against both defendants for negligence. It is the plaintiff's case that the loss of the goods, subject-matter of this action, was occasioned by the negligence of the 2nd defendant acting as agent of the 1st defendant. Particulars of negligence are stated in the statement of claim to include the failure on the part of the 2nd defendant to keep in safe and proper custody shipping documents including the delivery order pertaining to the goods in question and causing the loss of the said delivery order.

At the outset, it is, I think necessary to highlight certain salient features in this case. First, there is evidence that the 2nd defendant could have received the relevant delivery order (Exh. P10) from Syarikat Kris Pahlawan Sdn. Bhd., on or about 21 April 1989 as reflected in the testimony of Mr. Liman DW1 wherein he says in effect that on or about the said date, he had received certain documents including the delivery orders in respect of the cargoes shipped through the vessel "MV Kris Lemona" which was scheduled to arrive at Rejang Port, Sibu, on or about 25 April 1989. This is further reinforced by DW1's letter dated 12 May 1989 (Exh. P18) addressed to the 1st defendant, the first paragraph of which states as follows:

> This is to inform you that the consignment of goods covered by bill of lading No. LE07-081369-H has been taken out of the Rejang Port Authority godown on or around 26-27 April 1989 by person or persons unknown. **The delivery order which was in our possession** had been taken out/stolen from the office by person or persons unknown and we suspect a forged signature of our shipping clerk has been used to obtain delivery of the consignment from the Rejang Port Authority. The manifest is still with us.

The part underscored is significant. Not surprisingly therefore, the 2nd defendant has conceded custody of the relevant delivery order (Exh. P10) in para. 3 of its defence under the particulars therein. From these same sources, it has also been established that the said delivery order had been lost or missing whilst in the custody of the 2nd defendant at the

material time. In this connection., Mr. Chin Yew Choy PW1 has testified that Mr. Liman DW1 had informed him that the said delivery order had been taken by some unauthorized person and that it had been used to clear the goods from RPA. This allegation has not been challenged or disputed in cross-examination although of course DW1, in his own testimony, has maintained that the said delivery order was not presented to RPA but when cross-examined as to how he knew about this, he merely replied that it was because he did not see it or was not allowed by RPA to have access to it. Furthermore, the letter (Exh. P18) clearly shows that the 2nd defendant had suspected that the delivery order had been used by some unknown person or persons to obtain delivery of the goods from RPA. There is evidence that DW1 after discovering the loss of the delivery order, had gone to RPA to check on the goods but found 3 empty containers instead. Evidence has also been led that on the basis of the chops appearing in the delivery order (Exh. P10), it would appear that the document has been cleared by RPA.

Now, Mr. Lim for the 2nd defendant has submitted that no one from RPA has been called to testify as to whether the said delivery order (Exh. P10) had in fact been presented to RPA for the release of the goods. Such a submission would have some weight if the plaintiff were to rely on the mere production of the delivery order without calling the relevant witnesses from RPA. However, in this case, there is already admission on the part of the 2nd defendant *vide* its letter (Exh. P18) as well as the letter dated 10 August 1989 (Exh. P6), the pertinent part therein states:

> We are instructed that the delivery orders and other shipping documents in respect of the said consignment were in fact stolen by person or persons unknown from the premises of our agent in Sibu and it transpires that the said documents were later presented to the Rejang Port Authority with forged signatures to obtain delivery of the said consignment ....
>
> In the premises, our clients maintained that liability, if any, would have to attach with the Port Authority for negligently releasing the goods to third parties ....

In the circumstances, there is sufficient evidence to hold that the relevant delivery order (Exh. P10) had, on balance of probabilities, been presented to RPA for the release of the goods and that the goods had been so released.

The plaintiff has maintained that the 2nd defendant was negligent in failing to keep in safe and proper custody the relevant delivery order (Exh. P10) and in losing the said document thereby precipitating the release of the goods to some unknown person or persons by RPA. In this connection, Mr. Chin Yew Choy PW1 has testified in effect that when he checked with Mr. Liman DW1 as to how the delivery order could have been lost or stolen, he was informed that the said delivery order was left on DW1's desk and as a result, someone could have taken it.

The 2nd defendant, in denying negligence, has called a number of witnesses to explain how the various shipping documents including the delivery order were received, filed and kept in the office. According to Mr. Liman DW1 upon receipt of the documents in respect of the consignments on board the vessel "MV Kris Lemona" arriving at Rejang Port, Sibu, on or about 25 April 1989, he handed them to his senior shipping clerk Mr. Chia Song Teck DW6 for his custody. This is confirmed by DW6 who says that he kept the documents in his drawer under lock and key. Mr. Tie Chieh Chieng DW3 has corroborated this. However, none of them has been able to explain how, given the practice adopted by Mr. Chia Song Teck DW6, the relevant delivery order (Exh. P10) came to be lost, missing or stolen, at the material time. They are unable to offer any reasonable explanation for this. To them the loss has remained an enigma.

Be that as it may, I think certain features are clearly discernible on the evidence and the circumstances. First, although the evidence shows that generally members of the public who wanted to deal with Mr. Liman DW1 and his staff would have to do so at the counter and were not allowed to proceed beyond that counter, there were nevertheless cases where certain people such as the consignees, their agents, the officers from the Customs Department and the RPA staff were allowed to go beyond the said counter in their dealings with them. According to Mr. Liman DW1, there were no hard and fast rules about this, The evidence also shows that although Mr. Chia Song Teck DW6 was assigned to take charge of the delivery orders in the shipping division of the 2nd defendant, he had also other duties to perform. There were occasions when he would have to leave the office for Tanjong Manis to supervise the loading or unloading of cargoes on or from vessels anchored there. In such cases, he would hand over the keys to the drawer where the delivery orders were kept to any of the other staff including Mr. Liman DW1. I have the distinct impression that Mr. Chia Song Teck DW6 was quite a busy man both in and out of the office but so were the other staff. They were all in an open office and there was apparently a great deal of mobility of people in that office. There is evidence that documents such as the delivery orders were very often referred to and hence although they might have been kept in the drawer under lock and key, they would have been taken out on a very regular basis. This was done not only by Mr. Chia Song Teck DW6 himself but also by Mr. Liman DW1 and at least 2 other staff in the shipping division. The keys to the drawer would not be with DW6 at all times as he would have to hand them over to another staff if he was called upon to do duties at Tanjong Manis. Given such a scenario, it would therefore not be difficult to accept the possibility, or even the probability, that documents including the delivery orders could well be misplaced or left unattended on the tables, counter, etc, even if temporarily. Such a probability is perfectly conceivable in all the circumstances.

Secondly, under the terms of the delivery order (Exh. P10), the 2nd defendant was obligated to notify the consignee of the intended arrival of the vessel "MV Kris Lemona" at the RPA. This must be to allow the consignee and its agent to make the necessary preparations in taking delivery of the goods as soon as they were discharged from the said vessel or while the goods were placed under free storage in the container yard of RPA. Here, there is evidence that Mr, Liman DW1 or his staff would have received the said delivery order on or about 21 April 1989 and yet up to 10 April 1989, neither he nor any of his staff appeared to have taken the effort or time to notify the consignee and/or its agent of the intended arrival of the vessel and the goods in question. In that context, it would not be inconceivable to take the stand that if notification had been given in time or within a reasonable time, the consignee or its agent might well have hastened the processes of payment and exchange of the delivery order thereby effecting the speedy release of the goods concerned. It was patently obvious that neither Mr. Liman nor his staff knew of the existence of the delivery order (Exh. P10) despite the lapse of about 20 days after receipt thereof. There is evidence that although they knew of the nature of the documents received, they did not know how many of such documents were received. Thus, it would not be unreasonable to assume that if one or two of the documents were missing, they might not have known about it at the material time. This was exactly the situation with respect to the missing delivery order (Exh. P10). Quite obviously, Mr. Liman DW1 and his staff only knew of its existence after Mr. Chin Yew Choy PW1 had inquired about it. Had it not been for the said inquiry, they might never have known of its outcome. True, there might be other documents such as the tally sheets and the shipping manifest from which they could counter-check but that would have taken a great deal of time and effort. Even then there would be no guarantee of a complete solution. In my view, it would appear that there was no proper indexing system adopted by the 2nd

defendant in tracking and monitoring the movements of any particular document such as the delivery order which (as admitted by Mr. Liman DW1) was regarded as an important document, from the time it was first received until it was released to the proper person, On receipt of such documents, only their general nature was known or noted. As I have said, Mr. Liman DW1 and his staff would not even be concerned as to how many delivery orders they received on any particular consignment. According to him, he could have received from 50 to 100 delivery orders in respect of the consignment in this case. There is an element of uncertainty about the actual number of delivery orders received. It would appear that he did not think it important to know or to keep record of how many such documents were received at any one time. I think this would be significant and crucial because unless they kept track of the exact number of such documents received they would not be able to swiftly notify the consignees and/or their agents of the arrival or intended arrival of the cargoes. Here, as I have said, there was a lapse of about 20 days before Mr. Liman DWI and his staff came to know of the existence of the delivery order (Exh. P10). Given this situation, it is not difficult to foresee that if there was earlier notification or if notification was made within a reasonable time after the arrival of the vessel "MV Kris Lemona" at Rejang Port, Sibu, the consignee or its agent might well have hasten the process of obtaining the delivery order (Exh. P10) so as to secure the prompt release of the goods concerned and thus might have averted the improper delivery of the said goods to person or persons unknown.

For the reasons given and on the evidence as a whole, I do not think that the relevant witnesses for the 2nd defendant have given any reasonable and/or satisfactory explanation as to the loss of the delivery order (Exh. P10). I am more inclined to accept the testimony of Mr. Chin Yew Choy PW1 that he was told by Mr. Liman DW1 that the said delivery order was somehow left unattended on his desk and was then surreptitiously taken by some unauthorized person or persons. In the circumstances and in that context, negligence on the part of the 2nd defendant has been established, on the balance of probabilities. This I so hold.

In the instant case, the plaintiff has also claimed against the 1st defendant for the negligence of its agent the 2nd defendant. In denying negligence, the 1st defendant appeared to rely on the exemption cl. 2(c) in the bill of lading (Exh. Pl). To appreciate this proposition more fully, I think it appropriate to cite the whole of cl. 2 therein. It stipulates as follows:

> 2. During the period before the goods are loaded on or after they are discharged from the ship on which they are carried by sea. The following terms and conditions shall apply to the exclusion of any other provision in this bill of lading that may be inconsistent therewith, *viz*. (a) so long as the goods remain in the actual custody of the carrier or his servant (otherwise than as mentioned in sub-clause (b) hereof) the carrier shall not be liable for loss, damage or detention arising or resulting from the act, neglect or default of the servants or agents of the carrier nor from any other cause whatsoever arising without the actual fault or privity of the carrier... (b) whilst the goods are being transported to or from the ship...such transport or loading or unloading...it shall be done at the sole risk of the owners of the goods .... (c) in all other cases the responsibility of the carrier whether as carrier or as custodian or bailee of the goods shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely on discharge when they are free of the ship's tackle.

It seems clear that the said clause makes no mention of exempting the carrier from liability for negligence. If exemption for negligence were to apply it would have been expressly stated. As *Charlesworth on Negligence* (6th Edn.) said on p. 1286:

> ... there are numerous cases in which it has been held that a clause in the contract of carriage exempting liability for loss or damage but not referring to negligence, does not exempt them from liability for negligence.

Thus, in my view, cl. 2(c) relied upon by the 1st defendant could not be construed as exempting it from liability for negligence. Here, I have held the 2nd defendant to be negligent in having lost the delivery order (Exh. P10) which precipitated the release of the goods to person or persons who were not the consignees. The 2nd defendant was at all material times, the shipping agent of the 1st defendant. The act of the 2nd defendant was one which was done in the course of its employment as shipping agent. Such an act must be imputed to the 1st defendant as principal. The 1st defendant was therefore vicariously liable for the negligence of its agent, the 2nd defendant in this case. This I so hold.

I come now to the plaintiff's claim against the 1st defendant for damages for breach of contract, to wit, the failure to deliver the goods, subject-matter of this action, to the consignee under the relevant bill of lading (Exh. Pl). It is the plaintiff's case that the contract as reflected in the bill of lading (Exh. Pl) was fundamentally to deliver the goods stated therein to the consignee Hua Ho (1981) Co. In this respect, it has relied in particular on the clause appearing on the front of the bill of lading (Exh. Pl) which stipulates this:

> This bill of lading shall be construed and governed by Malaysian law and shall apply from the time the goods are received for shipment until delivery, but always subject to the conditions and exceptions of the carrying conveyance; it shall be given up, duly endorsed, in exchange for delivery order if required.

Mr. Kho for the plaintiff has relied on the Privy Council case of *Sze Hai Tong Bank v. Rambler Cycle Co. Ltd.* [1959] AC 576 where it was held that the exemption clause (which is *pari materia* to cl. 2 in our case) did not apply because the non-delivery or misdelivery of the goods, had the effect of defeating a fundamental term of the contract, to wit, the proper delivery of the goods by the shipping company to the consignees or their assigns. Lord Denning in *Sze Hai Tong* was of the view that the shipping company in that case had deliberately disregarded the fundamental term aforesaid. Citing a number of cases in support, his Lordship went on to say:

> In each case it was held that the principal could not take advantage of the exemption clause. **It might have been different if the servant or agent had been merely negligent or inadvertent:** see *Smackman v. General Steam Navigation Co.; Ashby v. Tolhurst* by Sir Wilfred Green MR and *Swan, Hunter & Wigham Richardson Ltd. v. France Fenwide Tyre & Wear Co. Ltd.*

It may be argued from the part underscored above that negligence would be excluded. I think that the use of the word "might" tends to suggest that it would not operate in all cases of negligence. I would take it that the statement was made in the context of the cases he referred to, where there were specific clauses in the contract exempting the shipping company or its agents from liability for negligence. I think this made sense because unless it was expressly covered by the exemption clause, it would neither be reasonable nor proper to absolve the negligence of the shipping company or its agents in performing a fundamental term of the contract of carriage, namely, the proper delivery of the goods to the designated consignee or consignees.

The exemption in cl. 2 cited above is rather comprehensive and the 1st defendant has construed cl. 2(c) thereof as absolving it from responsibility or liability in this case. Under the contract as reflected in the bill of lading (Exh. Pl) it seems clear that one of the main objects is the proper delivery of the goods stated therein by the 1st defendant to the consignee Hua Ho (1981) Co. It would defeat this object entirely if the 1st defendant or its agent acting negligently had caused the goods to be delivered to some unauthorised person or persons thereby resulting in loss to the plaintiff, without being liable for the consequences.

In my view, cl. 2(c) must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract. It must at least be modified so as not to permit the 1st defendant as the shipping company and/or its agent, in the circumstances of this case, to disregard its obligations as to delivery.

In the instant case, there is ample evidence to indicate that the goods in question were not delivered to the designated consignee Hua Ho (1981) Co. The evidence shows that they were released to person or persons unknown instead. In the circumstances, the plaintiff has established, on balance of probabilities, that there has been a breach of contract on the part of the 1st defendant in failing to deliver the goods concerned. This I so hold.

In summary therefore, the plaintiff has succeeded in his claims against the defendants. Mr. Kho has indicated that the plaintiff is only claiming for the invoice value amounting to RM457,800 with interest as prayed for and costs to the plaintiff. Having heard what has been said by Counsel for the parties concerned, I will allow the plaintiff's claim for the amount of RM457,800 with interest at the rate of 6% p.a. from date of summons to date of judgment and thereafter at 8% p.a. from date of judgment to date of full payment. Cost to the plaintiff.